

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD W. HAY, ET AL.

PLAINTIFFS

VS.

CIVIL NO. CCB-08-2662

CONSTELLATION ENERGY
GROUP, INC., ET AL.

ERISA LITIGATION

DEFENDANTS

Baltimore, Maryland
June 17, 2010

The above-entitled case came on for a motions
hearing before the Honorable Catherine C. Blake,
United States District Judge

A P P E A R A N C E S

For the Plaintiffs:

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For Constellation Energy Group, Inc., et al.

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Official Court Reporter

For the Individual Defendants:

James D. Mathias, Esquire
Ian C. Taylor, Esquire

P R O C E E D I N G S

THE COURT: I see some of you again. Please be seated.

THE CLERK: The case pending before this Court is Civil Action Number CCB-08-cv-2662, Ronald Hays versus Constellation Energy Group, Inc., et al. This matter is set in for a motions to dismiss hearing.

THE COURT: All right. Good afternoon, Mr. Mathias.

MR. MATHIAS: Good afternoon, Your Honor.

THE COURT: I will just tell you a couple of things that I am looking for help on from both sides as we go through, which you probably were going to do. There's a question of who exactly are the fiduciaries, where do we have an agreement, and where do we not?

I would like some focus on the actual specific controlling language of the plans, which is obviously critical and seems to be somewhat different between Constellation and Nine Mile, counsel, a little bit of discussion, and this may be more on the plaintiffs' side, understanding that you think that at some point it was not prudent to continue contributions to the company stock fund, when, and I guess for both, does it make a difference whether we are talking about continuing to offer the stock fund as an option for

1 participants versus continuing to contribute the
2 matching amount to, the employer matching amount to a
3 stock fund? Is there any difference in the
4 obligations? Does the language of the Plan make any
5 difference in how the fiduciaries, whoever they were,
6 should have looked at those options?

7 And I am also happy to hear whatever it is you
8 were going to say anyway.

9 MR. MATHIAS: Thank you, Your Honor, Jim Mathias
10 for the individual defendants. I'm going to address
11 Count I, prudence and loyalty.

12 THE COURT: Okay.

13 MR. MATHIAS: Mr. Gillespie, who represents
14 Constellation and Nine Mile, will address the other
15 counts and perhaps some specific matters to the
16 company.

17 THE COURT: Okay.

18 MR. MATHIAS: I would like to start with just a
19 brief overview and then go back in some detail and
20 address some of the questions Your Honor has.

21 Both in the securities case you heard this
22 morning and the ERISA case this afternoon, we
23 basically have the same core facts and factual
24 theories, and all of this takes place within the
25 framework of a worldwide credit market meltdown, where

1 stocks dropped for a number of companies for a number
2 of reasons.

3 The ERISA prudence laws in the stock-drop
4 context are not designed to deal with all bad news or
5 every stock drop or every adverse development.
6 Instead, they are designed to deal only with
7 extraordinary circumstances that create a duty for a
8 fiduciary in this context to disobey a Plan that says
9 the company stock will be offered, and to order a
10 complete divesting of company stock from the Plan,
11 because there's no duty of diversification.

12 So if there's an argument in this context with
13 an ESOP that the fiduciary had a duty to step in and
14 act, it's a duty to divest entirely at a particular
15 point in time of all company stock.

16 So that's both a unilateral and somewhat
17 extraordinary, if not radical, alteration of the Plan
18 participants' portfolios, and of their choice, and
19 that's an important point that I will come back to,
20 that in this instance, the Plan participants, at any
21 point in time they have complete discretion to decide
22 what offerings in the portfolio they want to invest
23 in, and they can change it at anytime.

24 So in keeping with the extraordinary nature of
25 this kind of action being asked of a fiduciary or

1 being put on a fiduciary as a duty, the plaintiffs
2 need to show not just the price drop, but some kind of
3 precipitous decline, an extraordinary decline in the
4 stock price. And more than that, they need to show
5 that the fiduciaries had some knowledge or should have
6 known in advance that the stock price was going to
7 continue to decline in the future, such that they had
8 an obligation to step in and act.

9 Furthermore, in most cases the plaintiffs need
10 to show some knowledge of not just a decline, but of
11 an imminent collapse in the company, in the company's
12 stock price, and at the very least, need to show that
13 they are dealing with some dire situation.

14 I think it has been described in a number of the
15 cases as, if you get to the Moench presumption, that
16 is a substantial shield that protects the fiduciary
17 from having to act, and the point is you don't react
18 to every possible stock drop.

19 With regard to that, in terms of showing
20 extraordinary circumstances that take this out of the
21 case of what most companies were dealing with, which
22 were just on a day-to-day basis, everyone trying to
23 decide what's going on with the credit market, what's
24 going on with the overall economy, what's going to
25 happen tomorrow, what's going to happen the day after

1 tomorrow, the plaintiffs have pointed to three buckets
2 of factual allegations which will be familiar to you
3 from the securities case.

4 THE COURT: Let me back up for one second before
5 that.

6 MR. MATHIAS: Sure.

7 THE COURT: You said that what you think they
8 are suggesting is that there would have been a duty to
9 not just take away the availability of the company
10 stock fund as an option for participant contributions,
11 not make any further investments in company stock
12 funds, you're interpreting what they are requesting,
13 the obligation that they would impose would be a
14 complete divestiture, sell off all the company stock.

15 MR. MATHIAS: Well, I believe that's the legal
16 test here. There's no duty to diversify in an ESOP.
17 So if you decide that the company stock is an
18 imprudent investment, you've decided that one share is
19 too many. I think that's an important point, because
20 I think it speaks to the legal principles that the
21 Court should apply in this case.

22 The factual background, the buckets of
23 allegations, and I'll come back to these and discuss
24 them in more detail later, but the three things that
25 the plaintiffs in their Amended Complaint and in the

1 motions papers focus on is simply that Constellation
2 had a risky business model and was mismanaging the
3 company, and should have known that they had a risky
4 business model that was going to lead to the company
5 stock becoming an imprudent investment.

6 They also point to the collateral downgrade
7 estimate calculation error, and they point to the
8 Lehman situation in September of 2008 and its effect
9 on Constellation.

10 We believe the facts here show, and if you look
11 at the allegations, that at all times Constellation's
12 future stock performance remained unpredictable,
13 unknowable, and that the company was reacting just
14 like everybody else to an unfolding situation, and
15 that the plaintiffs have got to allege something that
16 suggests that the fiduciaries knew something different
17 and knew what was going to happen and, therefore,
18 should have acted, because there is no obligation for
19 the fiduciaries to outsmart the market.

20 So here, ultimately the facts will matter, the
21 knowledge or the should have known of the fiduciaries
22 will matter, and I'm going to spend more time on this
23 later, the timing of when things occurred and how they
24 occurred really does matter here, because there is a
25 difference between knowing something in advance on the

1 one hand, and reacting to a situation on the other
2 hand. We think that the facts as alleged here from an
3 ERISA standpoint actually are quite unremarkable.

4 So with that as a prelude, I want to turn to the
5 Plans. The Plans, both the Constellation Plan and the
6 Nine Mile Plan, here were EIAP's, Eligible Individual
7 Account Plans, and the Constellation Common Stock
8 Fund, which was offered in both Plans, is an ESOP, the
9 purpose of which is to encourage employee ownership in
10 Constellation's stock.

11 The Plans consisted of voluntary contributions
12 by the participants and the company-matching
13 contributions.

14 The company match, at all times and in all
15 cases, here was always in the Constellation Common
16 Stock Fund in both Plans, and that's specified in the
17 Plans and the SPD's for the Plans, that the company
18 match shall be initially invested, or will be
19 automatically invested in the company stock.

20 Now an important point is immediately, if the
21 participant does not want to have company stock, they
22 may move it into one of the other 20, I believe it was
23 different offerings in the overall Plans. So there
24 was a Constellation Common Stock Fund, an Interest
25 Income Fund, and then about 20 mutual funds, and 24

1 hours a day, seven days a week, there were ways for
2 Plan participants to give the Plan notice that they
3 wanted to change their portfolio.

4 The Plans themselves do not in any way expressly
5 grant the fiduciaries any discretion to remove
6 Constellation stock as an option in the Plan. I think
7 that's an important point here.

8 Essentially, you would have had to rewrite the
9 Plan with regard to matching contributions and other
10 things if Constellation stock were to be removed from
11 the Plan, and that is a settlor function.

12 You will notice in the papers frequently the
13 plaintiffs, in the motions papers, refer to
14 Constellation generically and don't designate whether
15 they are talking about them as a fiduciary or whether
16 they are talking about them as the settlor of the
17 Plan, but that's an important distinction, because in
18 a Plan like this, it's the settlor who decides what
19 goes into the plan.

20 THE COURT: Right.

21 MR. MATHIAS: The only argument that the
22 plaintiffs have raised is the argument having to do
23 with the use of the word or, which suggests to them
24 that the fiduciary somehow had discretion to remove
25 Constellation stock from the Plan. But if Your Honor

1 goes back and looks at what the Plan says, it's
2 talking about investments and it says the money can be
3 invested in the Constellation Stock Fund, the Interest
4 Income Fund, or the Plan, the offerings picked by the
5 fiduciaries. So you have three things.

6 THE COURT: Well, it says any other -- I mean
7 I'm looking at page 16 of the Plan, Section 5.1(a).
8 That is the Constellation Plan now that I'm looking
9 at.

10 MR. MATHIAS: Right.

11 THE COURT: It's one or more of the following
12 investment funds, and it's the CEG Common Stock Fund,
13 the Interest Income Fund, or any other investment fund
14 selected by the Investment Committee from time to
15 time.

16 MR. MATHIAS: So that the Plan designates. You
17 have the Constellation Common Stock Fund. You have
18 the Interest Income Fund, and then you have other
19 investment funds selected by the Investment Committee.

20 Then in the definitions section, it actually
21 defines those terms of investment funds and other
22 investment funds, investment funds to include
23 Constellation stock. Other investment funds does not.
24 That is at Appendix A.

25 THE COURT: Okay. The definitions. Why does

1 that not give the fiduciary the discretion to leave
2 out the Common Stock Fund, to say well, we're going to
3 go with some of these other investment funds?

4 MR. MATHIAS: First of all, it's an ESOP that
5 says matching contributions are automatically, or
6 shall be invested in the company stock.

7 THE COURT: I understand that.

8 MR. MATHIAS: It presupposes that the company
9 stock is going to be involved.

10 THE COURT: Right.

11 MR. MATHIAS: The disjunctive of or means that
12 there are going to be three offerings. There's going
13 to be the Constellation stock. There's going to the
14 Interest Income Fund, and then there's going to be any
15 other investment funds that are selected by the
16 Committee.

17 That doesn't suggest that the Investment
18 Committee has any discretion from the settlor to
19 influence one or two.

20 THE COURT: Well, but then how do you interpret
21 it when it says contributions for the Plan will be
22 invested in one or more of the following?

23 MR. MATHIAS: Because contributions to the Plan
24 will be -- first of all, it says invested.

25 Remember, this is the Plan that controls what

1 Plan participants can do. Plan participants put in
2 their own money, and they can put it into anything
3 they want to.

4 THE COURT: Right.

5 MR. MATHIAS: So they don't need to invest in
6 Constellation Common Stock.

7 THE COURT: Right.

8 MR. MATHIAS: They can invest in any one of
9 those three. But what we are talking about here is
10 what the settlors have determined should be offered.
11 If the fiduciary stepped in and took away the CEG
12 Common Stock Fund, then that statement would no longer
13 be true.

14 The way the settlor set it up, a Plan
15 participant would not be able to invest in it. So you
16 would be changing the character of the fund and you
17 would be changing the options available for people to
18 invest.

19 THE COURT: Okay.

20 MR. MATHIAS: Again, I think I made this point,
21 but it's talking about how the money would be
22 invested, not what the selections are that are
23 available.

24 So with that, let's turn to the --

25 And with regard to your question about the

1 fiduciaries, there was a question about whether anyone
2 was acting as a fiduciary here, and I'm going to get
3 to that in just a second. But to the extent a
4 fiduciary, that a duty arose for a fiduciary to act,
5 we believe it would be limited to the Investment
6 Committee members and the Plan Administrator, Ms.
7 Behlert, not to Constellation.

8 THE COURT: The Investment Committee and Ms.
9 Behlert?

10 MR. MATHIAS: Right.

11 Now the threshold issue, Your Honor, is that a
12 fiduciary cannot be liable for breaches of duty of
13 prudence if they are not acting as a fiduciary.

14 In this case, as we just talked about,
15 Constellation stock is to be offered. That's the
16 rule. That's consistent with section 404(a)(1)(D) of
17 ERISA which says a fiduciary is required the follow
18 the Plan so long as it is consistent with the rest of
19 ERISA.

20 So where a duty might arise in certain
21 circumstances would be a narrow exception where the
22 situation is so extraordinary that even though the
23 Plan says stock will be offered, the fiduciary makes a
24 decision that it would not be prudent and, therefore,
25 is not consistent with ERISA.

1 So our position, just so it's clear, is there's
2 no fiduciary power to take Constellation stock out of
3 the Plan unless you get to that circumstance, that
4 extraordinary circumstance. Again, as we mentioned
5 earlier, that's consistent also with the absence of
6 any duty to diversify.

7 So that's the threshold question. The cases
8 usually focus on that.

9 The next thing you get to is you say are we
10 going to recognize a Moench presumption, what has been
11 called the Moench presumption?

12 Your Honor, I think that the Moench presumption
13 really does flow out of that idea that there is not a
14 fiduciary power to act unless an extraordinary
15 circumstance exist.

16 In that regard, it really isn't an evidentiary
17 presumption or an affirmative defense. The courts
18 have said, and the trend in the law is that where you
19 have this situation, the plaintiffs have to plead some
20 facts that suggest that this extraordinary
21 circumstance exist so that a duty in fact has arisen
22 where it otherwise wouldn't under the Plan.

23 So we believe the Moench presumption both
24 applies here and applies at the motion to dismiss
25 stage, which the Third, Fifth, Seventh and Ninth

1 Circuits all have found, and certainly many trial
2 courts over the last several years have adopted that.

3 Now in terms of what you would do other than the
4 Moench presumption, the only thing the plaintiffs have
5 pointed to is the DiFelice standard.

6 I would just say the DiFelice case, if you look
7 at it, was a completely different circumstance, where
8 the company was the fiduciary. The company had, as
9 the fiduciary, had complete discretion on what to do
10 if terms of what the options were with regard to
11 company stock, and in fact, there were things in the
12 Plan that discouraged the use of company stock.

13 THE COURT: Right.

14 MR. MATHIAS: So the Moench presumption really
15 ought to apply here.

16 The other reason, or the other thing to point
17 out at this point about the Moench presumption is it
18 reflects the reality that if you hold the fiduciary to
19 too wide a standard or too quick a standard in terms
20 of when a fiduciary has to step in and divest of
21 company stock -- in other words, if you were to
22 suggest that any time there's a drop in the stock
23 price, they would have to do something -- you really
24 create a terrible Catch-22 for the fiduciary because
25 if they divest of the stock, and then the next day or

1 the next week the stock rises, and they have taken
2 everybody out, they're going to get sued for that.

3 So they're on the horns of a dilemma, and that's
4 why it should only be, it should only be exercised in
5 the most extraordinary circumstances.

6 So that gets us to whether in this case they
7 have alleged facts that would overcome the Moench
8 presumption or to suggest that there is any abuse of
9 discretion by the fiduciary.

10 THE COURT: Do you think it makes a difference
11 in the applicability of the Moench presumption or
12 anything else that there's a difference in language
13 between the Constellation Plan and the Nine Mile Plan?

14 MR. MATHIAS: I don't, Your Honor, because,
15 first of all, I think the cases now indicate that if
16 the Plan in any way -- some cases have gone so far as
17 to say if the Plan permits the use, or the offering of
18 company stock.

19 But if the Plans presuppose, for instance, the
20 use of company stock where it's an ESOP and there's
21 some limitation on the discretion to take company
22 stock out, and they're clearly trying to encourage
23 employee ownership of company stock, that the Moench
24 presumption ought to apply.

25 While the language is slightly different in the

1 two Plans, when you look at the NMP Plan and the SPD
2 that describes it, it's pretty clear that it
3 presupposes at the very least that company stock will
4 be offered. The language in the SPD is that it will
5 automatically, all matching contributions will be
6 invested in company stock. So I don't think it makes
7 a difference.

8 With regard to overcoming the Moench
9 presumption, I now want to go back to the factual
10 allegations, and the first one is this notion of
11 mismanagement or some kind of improper or imprudent
12 business strategy. It's repeated several times in the
13 Amended Complaint, but it's listed as a list of five
14 or six items in paragraph seven and several other
15 paragraphs in the Amended Complaint. We also
16 mentioned it, repeated it in our motion to dismiss at
17 page five.

18 But essentially the theory is that
19 Constellation's fiduciaries knew or should have known
20 during 2008 that Constellation stock was going to
21 become an unduly risky and imprudent investment, and
22 they knew that in advance.

23 This is the exact same business model, Your
24 Honor, that Constellation had been following since
25 2001. While it certainly involved significant risks,

1 those risks were disclosed and those risks had
2 generated significant rewards for shareholders.

3 So the mere fact that a company has a business
4 model that is disclosed, and has been successful in
5 and of itself cannot be the basis for a prudence claim
6 unless the plaintiffs can show some fact that should
7 have led the fiduciaries to be able to predict the
8 future, and to know what was going to happen in the
9 future with the Plan and with the company stock, and
10 they haven't articulated anything of that nature.

11 With regard to the collateral downgrade estimate
12 calculation error, which is the second thing that they
13 point to, there's no allegation that the fiduciaries
14 had any idea in advance that that error existed. It
15 was simply a mistake that was found and corrected. It
16 was an automated process where they discovered it,
17 they disclosed it, and the stock dropped when they
18 announced it. Then the stock immediately began to
19 climb back up.

20 So as a fiduciary looking at this situation,
21 you've got a mistake. The stock is still trading at
22 \$83 a share. There's no indication that that reflects
23 some -- excuse me, \$83 a share before the mistake, and
24 then it dropped.

25 There's no indication that this goes to the

1 fundamental soundness of the business or the business
2 plan. It's simply a mistake that was reacted to. The
3 company shortly thereafter announced that it had
4 secured \$2 billion in additional liquidity to be
5 closed on in October.

6 So a fiduciary even looking at that situation
7 would see that the company had stabilized and
8 certainly does not lead to the kind of extraordinary
9 circumstance where it would no longer be prudent to
10 have an investment in the company.

11 THE COURT: Did the stock start to go back up
12 again?

13 MR. MATHIAS: The stock dropped the first day,
14 maybe the first couple days. Then by -- I think it
15 went from 73 down, about \$10. Then by August 28th, it
16 was back up to 68.

17 Now the third thing is the Lehman bankruptcy and
18 its effect on Constellation. I want to talk about
19 that in some detail, but I just want to start with
20 where the Class Period for this case is supposed to
21 start according to the plaintiffs, and go through the
22 time line, and we'll finish up with Lehman.

23 According to the plaintiffs, if taken literally,
24 as of January 30th of 2008, the fiduciaries had an
25 obligation to disobey the Plan and get every share out

1 of the company stock, and we submit that that's simply
2 ridiculous.

3 The stock was traded at \$92 a share. It was
4 near all time highs, and absent someone's ability to
5 predict a credit meltdown nine months later, that
6 makes no sense at all.

7 Fast forward to the end of July of 2008, the
8 stock is still trading at \$83. So the stock has gone
9 up and down over the period of seven months. It is
10 now at \$83. It has gone down about \$9 from where it
11 was January, certainly not a precipitous drop.

12 There's certainly no allegation that at that
13 point in time any fiduciary should have known what was
14 going to happen in the future or that there was any
15 indication. I mean at that point they didn't know
16 whether the stock would go up the next day or go down,
17 so again, not a situation where the duty to disobey
18 the Plan would come into any effect.

19 I talked earlier about the August 11th period.
20 You simply have an honest mistake. It was made. It
21 was disclosed. The stock price stabilized. It
22 started to increase, and the company announced
23 additional liquidity.

24 So again, you've got the stock price trending
25 down along with the market as the market jitters were

1 increasing, but still a strong company, nothing to
2 suggest, unless somebody could predict the credit
3 meltdown, that the company wasn't going to be in good
4 shape going forward.

5 So then you get to September 15th. As of
6 September 12th, the company stock had again trended
7 down slightly with the market, and on September 15th,
8 the market opens knowing that Lehman has gone into
9 bankruptcy.

10 There is no allegation that a fiduciary at
11 Constellation, number one, should have known that
12 Lehman was going to go into bankruptcy, number two,
13 known that the government was not going to bail out
14 Lehman in the way it had bailed out Bear Stearns, and
15 number three, been able to predict in the future,
16 predict the future that that would have a direct
17 impact on Constellation. Let me focus on those things
18 a little more.

19 The stock closed on Friday, September 12th at
20 \$58.38. On September 15th, the Monday, it closed at
21 \$47.99. Now this is before Constellation had issued
22 its 8-K, explaining anything about its relationship
23 with Lehman.

24 So the market is trending downward for a lot of
25 companies in the credit market because there's this

1 uncertainty about what's going on in the market. But
2 again, a fiduciary in that situation now doesn't have
3 preexisting knowledge or foresight. They're in the
4 situation of reacting to the market in the same way
5 everyone else is, and I don't believe there's a single
6 case, ERISA case under the duty of prudence that
7 suggests that a fiduciary would have an obligation to
8 predict the future or to step in in a fast-evolving
9 situation like that and decide how that situation is
10 going to be resolved.

11 On September 16th, AIG gets downgraded by the
12 rating agencies. The market continues in general to
13 spiral downward. Constellation ends that day at
14 \$30.76 a share.

15 Now this is the one place where I would say you
16 see the stock now declining at a significant rate,
17 where that wasn't the case on any of these earlier
18 dates. But there are two problems with the
19 plaintiffs' theory in trying to allege a breach of
20 prudence at that point.

21 First of all, I talked about the lack of
22 advanced knowledge that that was going to happen, and
23 the second thing is what's going to happen the next
24 day or the day after that? Is the stock going to
25 continue to go down?

1 In truth, what happened, and a fiduciary looking
2 at this situation, the company, within the time frame
3 of that one week, had two offers to stabilize the
4 company and move forward. So they couldn't have been
5 expected to predict the Lehman situation or the
6 complete freezing up of the credit market.

7 Then they look at the situation. If you're even
8 inclined to consider what they were looking at, we
9 know from the facts that the company was almost
10 immediately stabilized, and the stock began to move
11 up.

12 So the one situation, and this gets back to the
13 Catch-22, the one thing that the plaintiffs might say
14 is well, the stock continued to drop, and the stock
15 got all the way down to \$13 a share one day during
16 that week.

17 But think about that, Your Honor. If that had
18 happened and the fiduciaries had stepped in, even
19 though they knew that the company was working on these
20 offers that they had and was going to be able to
21 announce something that week, if the fiduciaries had
22 stepped in and divested of the company stock at that
23 point, that actually would have been the worst time to
24 divest of the company stock because we know that it
25 went back up, and went back up to \$32 within that

1 month of September. I'm sorry, not 32. It went up to
2 26 I believe, and a year later had gone up to 32.

3 So in fact, the proper and the appropriate thing
4 to do in that situation was -- it was a fast-evolving
5 situation. You have no advanced knowledge. You see
6 the situation. The company is stabilizing. The stock
7 is going to come back. You don't do anything.

8 If you compare that situation to all the cases
9 where the Moench presumption has been overcome,
10 there's always some advanced knowledge of something.
11 It's usually some kind of illegal activity or
12 accounting fraud or something that's known within the
13 company that the fiduciaries know, that they can say
14 with some degree of reliability is going to cause this
15 company stock to tank and the company is really going
16 to be in trouble. They know it in advance and they do
17 nothing.

18 That's why I said the timing is so important
19 here. You never have that point in time in this case
20 where the fiduciary had information that the market
21 didn't have and knew what was going to happen on the
22 next day with the stock, or had a pretty good idea of
23 what was going to happen with the stock.

24 Instead, you have a case where, and we all lived
25 through this, looking at the market every day, every

1 day they looked at it and had to guess is this the
2 bottom, is it over, is it going back up tomorrow, are
3 there going to be other problems?

4 But they didn't have any inside knowledge.
5 There was nothing they should have known that told
6 them it would continue to go down. To the contrary,
7 as I pointed out, to the extent they had knowledge at
8 all, they knew that the company had plans to
9 stabilize, and by the middle of that week had
10 announced it.

11 THE COURT: Short of going ahead and selling
12 off, what do you think should lead a fiduciary that's
13 in this sort of possible double loyalty situation to
14 get some outside advice, ask someone else outside of
15 the company whether there's any problem with
16 continuing to maintain this investment?

17 MR. MATHIAS: The short answer is no, because in
18 this situation they don't have a duty. They don't
19 have the discretion to act. The settlor has set the
20 Plan, and it is the settlor's function, and the duty
21 only arises if you have this extraordinary
22 circumstance because again, we're not talking about a
23 fiduciary. I think there's an important distinction
24 here.

25 In the DiFelice case, you had a fiduciary that

1 had discretion, everybody understands that, had
2 discretion that they could either offer the company
3 stock or not offer the company stock. But in a
4 situation where the fiduciary does not have that
5 discretion, there would be no reason for that.

6 Whether they've got that or not, they certainly
7 didn't have a duty to get that kind of outside advice,
8 because that's the whole purpose of the Moench
9 presumption, recognizing that the fiduciary does not
10 have that discretion. The Moench presumption only is
11 overcome if those extraordinary circumstances arise.
12 Until that happens, or unless that happens, the courts
13 don't look at all at what in fact the fiduciaries did
14 in the way of investigation.

15 THE COURT: Well, I'm looking at Moench. I
16 guess I didn't interpret it quite that same way. I
17 mean there would have to be --

18 Because the duty is somewhere between being
19 permitted and being required, I think the Moench court
20 said well, we're going to give them this presumption
21 of prudence. But they also looked at how the
22 Committee had interpreted the Plan documents, which
23 were fairly similar, if not even stronger in Moench,
24 that were supposed to be invested statewide in the
25 company stock and they said well, that's too strict a

1 reading.

2 I mean even in Moench they said no, you've got
3 to admit that there is some discretion under
4 extraordinary circumstances to go ahead and divest, or
5 go ahead and look for a different vehicle.

6 I thought they discussed at some point also, I
7 think one of the factors to look at if you get to that
8 point and you're going into discovery is well, did
9 they go to anybody else? Did they go to any outside
10 advisor, outside legal counsel, anyone, and say look,
11 we are really in a difficult position here, what do
12 you think? Is this a good investment to continue to
13 maintain?

14 MR. MATHIAS: Your Honor, the Moench case, if I
15 recall correctly, was essentially looking at the case
16 post trial, or certainly at a later stage.

17 THE COURT: Yes. There had been a summary
18 judgment.

19 MR. MATHIAS: Right.

20 THE COURT: And it reversed the summary judgment
21 actually. The District Court had granted summary
22 judgment and the Fourth Circuit --

23 MR. MATHIAS: The court was looking at a
24 developed record, and if I recall correctly, the court
25 went through its analysis and went through the various

1 stages of was there, was there a fiduciary duty, and
2 then talked about the Moench presumption. And it's
3 only if you overcome the Moench presumption that you
4 then get into an investigation of what was done by the
5 fiduciaries in the way of an analysis of the
6 investigation that was done.

7 At this point, unless those extraordinary
8 circumstances exist to create that duty to do
9 something, it's at that point that the Court would
10 look at okay, what did the fiduciary do in that
11 circumstance?

12 So the duty to investigate does not arise when
13 you're at this stage and the allegations have not
14 sufficiently been pled.

15 I think one case to look at in that regard which
16 is factually similar is the Kirschbaum case from the
17 Fifth Circuit.

18 THE COURT: I looked at Kirschbaum. Don't you
19 think Kirschbaum was a little -- goes a little further
20 than the Fourth Circuit would?

21 MR. MATHIAS: I don't know. I think the
22 Kirschbaum case is pretty consistent with the cases
23 that have been coming out of the other circuits and
24 out of the Southern District of New York.

25 Well, just briefly, then I want to jump to the

1 duty of loyalty, unless you had any other questions.

2 THE COURT: No. That's fine. Go ahead.

3 MR. MATHIAS: On the duty of loyalty claim here,
4 which is also part of Count I, it really is a claim
5 that the fiduciaries had made misrepresentations,
6 hadn't disclosed information about what was going to
7 happen to the company stock going forward, and there
8 are really only two points I want to make.

9 The first is that I don't think they have
10 alleged any materially misleading or inaccurate
11 statements in the SEC filings, other than to say the
12 company was overexposed and risky. Those kind of
13 generalities, for all the reasons I talked about
14 before, really aren't sufficient. So they haven't
15 identified a material misrepresentation, which they
16 need to.

17 But more sort of fundamentally, and I think the
18 case law is certainly trending this way, the SEC
19 filings of the company, that is a corporate function.
20 It is not an ERISA function or a fiduciary function.

21 In the Fourth Circuit, an ERISA fiduciary is
22 responsible only for disclosures about Plan benefits,
23 not disclosures about Plan investments. Maybe it
24 should or shouldn't matter, but some of the courts
25 look into sort of what's incorporated into what, and

1 we spell that out in our papers, even though that may
2 be elevating form over substance, and the basic point
3 ought to simply be that ERISA fiduciaries don't make
4 SEC disclosures.

5 In this case, it's the securities laws that
6 require the Plan sponsor to issue a prospectus. They
7 then incorporate the other SEC filings, the quarterly
8 filings and the annual filings into the prospectus.

9 Then here, the SPD, the Summary Plan Description
10 was also incorporated into the prospectus. So it
11 wasn't the other way around, that the Summary Plan
12 Description incorporated those other documents into
13 it, and there's nothing in the Summary Plan
14 Description that encourages people to, in considering
15 their Plan benefits, go read the SEC filings or
16 anything like that.

17 So for those two reasons, we think the duty of
18 loyalty claim has no merit. That's all I have for
19 now, Your Honor.

20 THE COURT: All right. Thank you.

21 MR. GILLESPIE: Your Honor, would you like to
22 hear from all of the defendants first or would you
23 like to alternate?

24 THE COURT: Well, why don't I ask plaintiffs'
25 counsel.

1 MR. BLOOM: No, no, no. By all means.

2 THE COURT: Go ahead.

3 MR. GILLESPIE: Thank you, Your Honor. I just
4 assumed we were following the protocol from this
5 morning.

6 On behalf of Constellation and Nine Mile, Your
7 Honor, I'm going to address as previewed the second
8 through fifth counts of the Complaint.

9 Plaintiffs plead in these counts that
10 Constellation, Nine Mile, and various individual
11 defendants breached fiduciary duties under ERISA.
12 They allege in Count II that there was failure of a
13 duty to monitor the fiduciaries. Count III is a
14 conflict of interest claim. Count IV, there's a
15 co-fiduciary breach liability claim. Then Count V,
16 there's a claim that even if Constellation wasn't a
17 fiduciary, they have some liability for participating
18 as a non-fiduciary, which they breached.

19 The overarching point I make here, Your Honor,
20 is that each of these claims fails because it's
21 derivative; that is, each claim depends on
22 establishing an underlying breach of ERISA fiduciary
23 duties.

24 Plaintiffs candidly acknowledge on page 37 of
25 their opposition that if they fail to allege what they

1 call primary breach of fiduciary duty, their
2 derivative claims are doomed as well.

3 As Mr. Mathias has reviewed, plaintiffs have
4 failed to establish a primary ERISA violation. So
5 that's, quite frankly, the end of the matter for Count
6 V.

7 But as we briefed, each of these counts also
8 have independent deficiencies. I'm not got to review
9 each of them. They're in the papers, and I would like
10 to focus the Court more on the primary claims.

11 I will discuss, however, briefly the conflict of
12 interest claim, and turning to that, I would like to
13 say that that claim failed because the Complaint
14 doesn't say how any purported conflict caused any
15 defendant to take an action that was detrimental to
16 the plaintiffs.

17 In DiFelice, the Fourth Circuit made clear that
18 mere status as an officer or director of a company,
19 even if you have an understandable interest in the
20 stock performance, that's not enough to create a
21 conflict.

22 That's basically all that we have here pled.
23 When we raised this argument in our opening brief, the
24 opposition didn't direct us to anything more than,
25 other than the bare corporate capacity allegations in

1 the Complaint.

2 One other point, Your Honor, I would note,
3 following up on Mr. Mathias's points, is that there
4 was, as Mr. Mathias noted, for example, at paragraph
5 seven, in the plaintiffs' laundry list of complaints
6 about why there wasn't prudence, a principal
7 allegation that they have is in subpart (d) in
8 paragraph seven on page three. It's that
9 Constellation somehow, it says, exposed itself to the
10 credit problems of Lehman Brother.

11 For the reasons we have addressed at length this
12 morning, that allegation just simply doesn't bear up
13 to what the facts were, and our colleagues in their
14 briefing were no more able to identify any specific
15 disclosure to Lehman than the securities colleagues
16 this morning.

17 With that, Your Honor, unless you have any
18 questions I have completed my presentation.

19 THE COURT: Thank you. Anyone else? No. Okay.

20 MR. BLOOM: Good afternoon, Your Honor. My name
21 is James Bloom from Keller Rohrbach.

22 THE COURT: You're going to have to yell or move
23 that mike. You're taller than the mike.

24 MR. BLOOM: As I said, I'm James Bloom from
25 Keller Rohrbach on behalf of the ERISA plaintiffs.

1 I wanted to quickly clear up one thing that
2 defense counsel was just mentioning about the claim
3 for a breach of the duty to avoid conflict of
4 interest. That's a duty that the Fourth Circuit
5 recognized in the DiFelice case; although in DiFelice
6 they said that mere status alone is insufficient.
7 There are factual allegations in the complaint that
8 are consistent with the allegations that DiFelice said
9 were lacking in that case.

10 For example, allegations that high-ranking
11 company officials sold stock, you can find that claim
12 in paragraph 215 of the Amended Complaint.

13 Paragraph 216 alleges that the defendants chose
14 to remain silent because of how selling the shares
15 might reflect on the directors and the company.

16 So those are two of the types of things that the
17 DiFelice court was looking for to substantiate the
18 duty to avoid conflicts of interest.

19 THE COURT: I'm not sure how 216 adds anything
20 more to the argument. I mean it makes the argument I
21 guess as is inherent any time in their status as
22 corporate officers, but I guess I'm not --

23 MR. BLOOM: That's correct, Your Honor. The
24 allegation is not as strong as the allegation that the
25 DiFelice court said would satisfy that duty; but

1 again, these are, you know, allegations made in a
2 complaint pre-discovery. DiFelice, I believe there
3 was a bench trial of some length.

4 THE COURT: Right, right. 215, the sale of
5 stock, I think, if I'm remembering correctly from the
6 other complaint, that sale by Mr. Shattuck was back in
7 early February of 2008?

8 MR. BLOOM: That's right, very near the time
9 that the stock was at its highest price during the
10 Class Period.

11 THE COURT: Okay.

12 MR. BLOOM: But looking now at our responsive
13 document, I don't see those paragraphs cited there.

14 THE COURT: Thank you.

15 MR. BLOOM: I put up on the screen here, this is
16 the Trust Agreement between T. Rowe Price and
17 Constellation Energy.

18 THE COURT: Yes.

19 MR. BLOOM: This is, of course, one of those
20 ERISA Plan documents that is required by the statute.
21 You have to have a trust pursuant to a written
22 instrument.

23 If you'll notice the last sentence of the first
24 paragraph on this agreement --

25 THE COURT: Just so I can find this here, let's

1 see, you're on page 31.

2 MR. BLOOM: That's right. That has been filed
3 as Exhibit 2, or Exhibit 1 to the Derek Loeser
4 declaration in support of the response.

5 THE COURT: Right. This particular page is
6 actually in the Second Amendment to the Trust
7 Agreement.

8 MR. BLOOM: This particular page, that's
9 correct.

10 THE COURT: Okay.

11 MR. BLOOM: So if you see where the little hand
12 cursor is on the screen there next to the word the --

13 THE COURT: Yes.

14 MR. BLOOM: -- the sentence reads the employer
15 may change or add additional investment options at its
16 discretion, provided, however, the Trustee Agreement
17 is required for the addition of company stock.

18 THE COURT: Uh-huh.

19 MR. BLOOM: Now this language was quoted in the
20 response and the reply from defendants was that well,
21 employer here simply refers to Constellation, refers
22 to it in its settlor capacity as opposed to its
23 fiduciary capacity.

24 However, I'm just going to switch to a different
25 page of this Agreement. Do you see definition of 1.8

1 there?

2 THE COURT: And what page are we on now?

3 MR. BLOOM: This is the third page of the PDF,
4 which I believe is page two of the unamended Trust
5 Agreement.

6 THE COURT: Okay. I've got it.

7 MR. BLOOM: Here, the Trust Agreement defines
8 employer to be Constellation Energy Group or any
9 successor company, and includes any authorized
10 designee of the employer, including the Plan
11 Administrator.

12 So the argument in the reply that that language
13 that Constellation has discretion to choose stock
14 options doesn't seem to quite match up. This reading
15 is definitely, or these documents definitely support
16 the reading that there is a fiduciary at Constellation
17 picking these investment options, which would be the
18 case, as I think even defendants concede, with the
19 other investment funds.

20 Now one final thing before I move away from this
21 Trust Agreement, if you go to provision 10.4, which is
22 on the 15th page of the PDF, and I believe page 14 of
23 the Trust Agreement.

24 THE COURT: Okay.

25 MR. BLOOM: The Trust Agreement notes that in

1 any conflict with the Plan document, in any conflict
2 between the provisions of the Plan document and this
3 Agreement, the provisions of this Trust Agreement
4 shall prevail.

5 So under this document, the clear import is that
6 the investment fiduciary as the Plan Administrator at
7 Constellation had fiduciary discretion to select
8 investment options, including company stock.

9 THE COURT: Okay.

10 MR. BLOOM: But again, now this Trust Agreement,
11 my understanding of the Trust Agreement is that this
12 is the Trust Agreement for both plans, for both the
13 Nine Mile Plan and the Constellation plan.

14 Under the Nine Mile Plan, I mean I don't think
15 there is any doubt that there is discretion there
16 about company stock. I mean the Plan says the Plan
17 Administrator may direct that matching contributions
18 will be invested in the CEG stock fund, and that's at
19 page 47. I believe that is cited in our response.

20 THE COURT: It says that the Plan Administrator
21 may direct that matching contributions will be
22 invested in the Constellation Group.

23 MR. BLOOM: May direct, that's right.

24 THE COURT: Right, right.

25 MR. BLOOM: Also I noted that defense counsel

1 here today characterized this Plan as an ESOP, an
2 Employee Stock Ownership Plan, but I was unable to
3 locate that language in the Nine Mile Plan document.

4 THE COURT: Does it make a difference if it's an
5 ESOP or an EIAP for purposes of the presumption of
6 prudence or anything else?

7 MR. BLOOM: Ultimately, ultimately, no, Your
8 Honor.

9 Okay. If you take look at Section 404(a)(1)(d)
10 of ERISA, that's D as in delta, ERISA has laid out a
11 fiduciary duty to obey Plan documents, but in the same
12 breath as the statute that Congress created that duty,
13 it also limited it. It limited it to situations where
14 the Plan documents are consistent with ERISA.

15 Now ERISA, of course, was designed to protect
16 retirement income security, and so it contains
17 numerous provisions about vesting and vesting
18 schedules, and many of those are proposed by a vehicle
19 saying the Plan documents must contain these types of
20 provisions.

21 So this is a way of saying that even if the Plan
22 document is inconsistent with the provisions of ERISA,
23 that the trustee has a duty to look beyond the Plan
24 document and consider the other provisions of ERISA,
25 for example, the duty of prudence.

1 Now in their reply the defendants say, the reply
2 to oppose the motion to dismiss on page six,
3 plaintiffs offer no case where a court found a
4 defendant liable for failing to take some action that
5 the defendant never was authorized to take.

6 The two cases that the plaintiffs cited on that
7 point were the Enron case, and I will start there
8 first. Judge Harmon, you know, was dealing with a
9 situation where matching contributions were to be
10 "primarily in company stock." What Judge Harmon ruled
11 in that context was moreover, an investment fiduciary
12 must disregard Plan documents that following their
13 terms would be imprudent.

14 The ADP case was the other case cited by
15 plaintiffs in their response. Although defendants
16 correctly point out that the Court in ADP did find
17 discretion, there was dispute about that and in the
18 ruling said even if there was no discretion regarding
19 company stock, a fiduciary cannot escape liability
20 merely by pointing to the Plan as requiring it to act
21 as it did. Even for a fiduciary to act consistent
22 with the Plan's directives, the fiduciary may be
23 liable if the actions were not in the participants'
24 best interests, e.g., they were found to be imprudent.

25 I believe this Court had a similar ruling in the

1 In re Mutual Funds case, and also the Morgan Stanley
2 case submitted by plaintiffs' second supplemental
3 authority out of the Southern District of New York
4 also makes that same ruling.

5 There, the Court found no discretion, said the
6 Plan documents required there to be an investment in
7 company stock; but it nevertheless held there was
8 still a duty of prudence imposed by the statute.

9 That again was I believe Exhibit C to the second
10 supplemental authority, although I bring that up now
11 because we did make that plain or talked about that in
12 our second supplemental filing.

13 I guess one last point before I move on from
14 there, even the Moench case itself in its holding that
15 the presumption was rebutted, the way the Moench court
16 phrased it was the trustees have a duty in which they
17 can effectuate the purposes of the trust only by
18 deviating from the trust direction.

19 So there are some circumstances where even if
20 there is no discretion, the fiduciary must
21 nevertheless look past that.

22 THE COURT: Right.

23 MR. BLOOM: Here, while the fiduciaries were
24 examining the prudence of the company stock for their
25 Nine Mile Plan, perhaps they could have considered the

1 prudence of that stock for the Constellation Plan as
2 well.

3 THE COURT: When you say the fiduciaries were
4 examining prudence, you just mean you're getting back
5 to the difference in the language of the Plans?

6 MR. BLOOM: Right. That's right.

7 THE COURT: Okay.

8 MR. BLOOM: The fiduciaries had a duty, and had
9 they been exercising that duty on behalf of the Nine
10 Mile Plan, then they would conceivably have been able
11 to apply some of that same analysis in consideration
12 of the stock as far as the Constellation Plan goes.

13 But turning to the Constellation Plan itself, I
14 think the Court pointed out earlier that the one or
15 more language in Section 5.1(a) would not be violated
16 if the company stock was not offered as an option, and
17 if you turn to 5.1(d), there's a limitation where
18 company stock must only initially be invested in the
19 Company Stock Fund.

20 THE COURT: Suggesting that they would still
21 have to have a Company Stock Fund available for the
22 matching contributions.

23 MR. BLOOM: There's no doubt that the Plan
24 comprehends the existence of a Company Stock Fund.

25 THE COURT: Right.

1 MR. BLOOM: The question is whether that fund
2 has to be offered or whether any participant's money
3 has to be in it.

4 THE COURT: So you're going to get to the
5 Complaint and what's alleged in the Complaint and what
6 the circumstances were, going back to my initial
7 questions.

8 It is obviously a, what seemed to be me obvious,
9 a very hard decision for a fiduciary to know what is
10 that point? When should they go against what
11 certainly appears to be the primary purpose of the
12 Plan?

13 Are you suggesting, and can you identify a
14 point, and did you really mean January 30, 2008, and
15 tell me why, where you think the fiduciaries had an
16 obligation to sell off the company stock?

17 MR. BLOOM: Well, quite obviously, the specific
18 date in which that obligation arose is going to depend
19 on the particular fiduciaries and what they knew and
20 what they should have known. So starting the Class
21 Period January 30th, probably no time before January
22 30 did they have that obligation.

23 If you look at the statements that the company
24 was making throughout the summer and fall of 2008,
25 there are a few that really jump out here and I think

1 can help shed some light on this timing issue. Yeah,
2 here we go.

3 On August 27, 2008 there was an earnings call.
4 So this is now more than two weeks before the Lehman
5 Brothers Bankruptcy. Defendant Shattuck announced or
6 said that the company will have to reduce the capital
7 exposure to these businesses and do so in an
8 aggressive manner. Those are at paragraphs 159 and
9 160 of the Complaint.

10 So at that point, clearly the people who are at
11 Constellation and making these decisions understand
12 that they don't have the liquidity that they needed,
13 the credit security to continue their very risky
14 profit-oriented business and are going to have to make
15 some changes.

16 Now paragraph 178 of the Complaint, this is
17 after the Lehman collapse now, Defendant Shattuck said
18 that they are "hard at work to reduce risks in
19 collateral requirements to adjust to a new environment
20 where prices have declined, markets are liquid and
21 credit is scarce. We have changed the focus of our
22 commodities business to prioritize risk and collateral
23 reduction over the near-term realization of profits."

24 So those statements indicate a fundamental
25 change in course for Constellation's business, of

1 course, after the devastating losses of the company
2 stock and the devastating losses to the balances of
3 the retirement plan of the people who invested in the
4 company stock through the Company Stock Fund.

5 THE COURT: I mean there's obviously a loss that
6 was devastating for a lot of people. If you start at
7 that August 27th earnings call, what happens a couple
8 weeks later is Lehman goes bankrupt.

9 MR. BLOOM: That's right.

10 THE COURT: Are you saying that the
11 Constellation fiduciaries, whoever they were, should
12 have forecasted that bankruptcy?

13 MR. BLOOM: No, Your Honor. What's going on
14 here is that the fiduciaries knew they were exposed.
15 They knew that the company's model was unsustainable
16 and that the company was at risk. What the
17 allegations in the complaint are is that they knew the
18 price of the stock was inflated.

19 What all of these things go back to is that
20 their knowledge that what it is trading for is more
21 than what it's worth. What this August 27th call is,
22 that's an outward public acknowledgment of what many
23 of them may have known there for sometime. So what
24 they're thinking about is sort of unknowable on the
25 outside prior to discovery, prior to taking

1 depositions, reading the corporate minutes, and things
2 like that.

3 So what this indicates is that they were aware
4 that the risk was there, and it happened about two
5 weeks later the risk materialized. They were no
6 longer able to obtain the credit that they needed to
7 manage their commodities business, and in this case,
8 it really pushed the company pretty far down the road
9 to insolvency.

10 They got an offer from Warren Buffett, which
11 they agreed to take, to buy the entire company for,
12 you know, \$4.6 billion, a deal they later backed out
13 of; but nevertheless, at the end of this whole
14 process, it ended up, as paragraph 178 of the
15 Complaint makes clear, changing the focus of their
16 business and selling a 50 percent interest in five of
17 their power plants to EDF for billions of dollars.
18 Again, they needed this liquidity to stay going in any
19 form at that point.

20 But I don't have the specific date where it was
21 per se, that was the date they had to sell the stock
22 prior to, prior to knowing more about what actually
23 happened inside the company.

24 THE COURT: Okay.

25 MR. BLOOM: I wanted to also look at briefly

1 what the Moench court held was sufficient to rebut the
2 presumption of prudence. On page 572 of the Moench
3 decision, the Court ruled when all is said and done,
4 this is precisely the argument that the plaintiff
5 makes in that case. There was a precipitous decline
6 in the statewide stock. The Committee had knowledge
7 of its impending collapse, and they focused on the
8 members' conflicted status.

9 There, the people had the dual responsibilities
10 as corporate officers and as ERISA fiduciaries and
11 that conflict, in light of the decline, in light of
12 their knowledge about the inflation, the Court ruled
13 that was sufficient to rebut the Moench presumption in
14 the Moench case itself.

15 Those are very much like the circumstances we
16 have in this case.

17 THE COURT: I mean the timing is difficult, but
18 hadn't it been going on for some significant time
19 period in the Moench case?

20 You can go back and look at the specific facts,
21 but --

22 MR. BLOOM: That's right. I mean among the
23 other facts that the court in Moench considered, I
24 believe on page 557 of that decision, they commented
25 that the company had a lack of quality management, had

1 unsound credit practices, and inadequate loan loss
2 reserves, all of which could have been taken right out
3 of the Complaint in this case.

4 Again, one last thing before turning away from
5 Moench -- well, actually that makes sense.

6 You asked before who were the fiduciaries and
7 what are the fiduciaries' responsibilities? There are
8 a few sets of fiduciaries in this case. You've got
9 Defendant Behlert, who is the Plan Administrator for
10 both plaintiffs.

11 You have the Investment Committee which is
12 described in the Constellation Plan and has
13 responsibility for selecting investment options.

14 You have Defendant Shattuck, who was on the
15 Board of Directors of Constellation, and the Board of
16 Directors of Constellation appointed people to the
17 Investment Committee.

18 You also have the two entities themselves, Nine
19 Mile and Constellation.

20 I do want to point out that the Nine Mile Plan
21 does name two different Plan Administrators, which is,
22 as far as I know, acceptable under ERISA to have two
23 different named fiduciaries, both Nine Mile itself and
24 the Plan Administrator, who in that case was Behlert.

25 THE COURT: Constellation does not do that?

1 MR. BLOOM: No. Constellation is not itself the
2 Plan Administrator. Constellation is the Plan
3 sponsor, and its fiduciary status comes up in a few
4 different ways.

5 Constellation is an entity that has
6 responsibility for the actions of all of its
7 employees. All of their employees are in some sense
8 the actions of Constellation, and it's also, and this
9 is just basic principles of corporate law, it is also
10 imputed with the knowledge of, at the very least, its
11 officers and directors, such as Shattuck and the
12 Investment Committee defendants and Defendant Behlert.
13 So what they knew, Constellation also knew.

14 Now Constellation and Shattuck are not named as
15 prudence defendants because they weren't the ones
16 responsible for choosing the investment option
17 directly.

18 However, and this is a key point, the defendants
19 argue that the duty to monitor is a purely derivative
20 duty, but it's really not. The duty to monitor has a
21 number of components, and one of those is to provide
22 information necessary for the monitoring fiduciary to
23 do their job.

24 So, for example, Shattuck, if he knows that the
25 stock is overvalued or, say, grossly overvalued, he

1 would have a duty to pass that information on to
2 Behlert and the Investment Committee if they didn't
3 know so that they could make the appropriate decision.
4 If they did know, and they didn't make the appropriate
5 decision, he would then have the duty to remove them.
6 So the duty to monitor is not purely a derivative
7 duty.

8 The duty to avoid conflict of interest is also
9 not purely derivative. However, the co-fiduciary
10 duties and the knowing participation by a
11 non-fiduciary, those two are in fact derivative. So
12 if there's no fiduciary breach, Counts IV and V are
13 out.

14 Just a few more points here. As far as the duty
15 of loyalty, it does contain a duty to disclose, and
16 not just disclose material adverse information. But
17 under Riggs, which is in the Fourth Circuit, the duty
18 to disclose is a core fiduciary duty, which predates
19 ERISA.

20 Now there are different aspects of the duty to
21 disclose on different individuals, and that's going to
22 depend to a certain extent on what they do.

23 However, Behlert, as the Plan Administrator,
24 ERISA Section 101 imposes the requirement of producing
25 a Summary Plan Description, and the named fiduciary is

1 often responsible for doing that, which is Defendant
2 Behlert, and in this case, the Summary Plan
3 Description specifically incorporated the SEC filings,
4 all Securities and Exchange Commission filings, if
5 memory serves.

6 So by incorporating those documents, she is
7 taking a fiduciary act that is different from the
8 corporate act of originally making those statements.
9 She is telling the participants all of these
10 statements are part of the Plan documents, and you can
11 re lay on them.

12 THE COURT: That is where in the -- I've got the
13 SPD. It's Exhibit J. Yeah, J.

14 MR. BLOOM: Exhibit J, the 29th page of the PDF.

15 THE COURT: Okay. The SEC filings are
16 incorporated in the prospectus by reference.

17 MR. BLOOM: That's right. That's the same with
18 Exhibit K, which is the Nine Mile SPD.

19 THE COURT: Uh-huh.

20 MR. BLOOM: I believe it's on the same page,
21 although these pages aren't numbered the same way, not
22 on my copy at least. It's on page 28.

23 MR. MATHIAS: On page 28 of the document.

24 MR. BLOOM: Yes, page 28.

25 THE COURT: Okay.

1 MR. BLOOM: Also, while we have the Summary Plan
2 Description in front of us, on page ESP-13 of Exhibit
3 J --

4 THE COURT: The incorporation language, is there
5 something that sort of continually updates that? When
6 you get a new SPD, does it update which SEC filings
7 are incorporated?

8 I mean these particular exhibits at least are
9 incorporating 2002, and 2003.

10 MR. BLOOM: That's right. And after those
11 bullet points it says in addition, you may receive
12 without charge, upon written or oral request,
13 Constellation Energy's Annual Report to shareholders
14 for its latest fiscal year and copies of all reports.

15 The fourth bullet point there, all documents
16 filed by Constellation Energy Group pursuant to
17 various sections of the Securities Act after the date
18 of this prospectus and prior to the termination of the
19 offering.

20 THE COURT: I'm sorry, where?

21 MR. BLOOM: That's the fourth bullet point there
22 on page 26 of Exhibit J.

23 THE COURT: Oh, and prior to the termination of
24 the offering of the securities offered hereby.

25 MR. BLOOM: Right.

1 THE COURT: Okay.

2 MR. BLOOM: I wanted to point out one last thing
3 about the SPD. This is still on Exhibit J. This is
4 page 16 of the exhibit, with the page number ESP-13 at
5 the bottom.

6 THE COURT: Okay.

7 MR. BLOOM: There's the statement that
8 Constellation Energy Group reverses the right to
9 modify or withdraw purchase and sale rights to
10 Constellation Energy Group stock for any given day to
11 protect its shareholders.

12 THE COURT: Right.

13 MR. BLOOM: So that language again seems to
14 indicate that, you know, maybe you have the right to
15 participate in the Company Stock Fund today, but maybe
16 that's not going to be there forever.

17 THE COURT: Well, it's giving Constellation, I
18 assume Mr. Mathias would probably argue in it
19 settlor's function, the right to change things.

20 MR. BLOOM: I think the point of the language is
21 that it's sort of ambiguous as to which function
22 Constellation would be acting in that capacity. But,
23 of course, as we point out, Constellation is not a
24 prudence defendant in this matter. But it would be
25 possible for them to delicate that authority and not

1 be in violation of this language.

2 The one last thing, the one last point I wanted
3 to make today is about the duty of --

4 Oh, actually there was one more about the duty
5 of prudence itself. What does being a prudent
6 fiduciary look like?

7 The DiFelice case actually has a fair amount to
8 say about that. You look both at the merits of the
9 transaction or the lack of a transaction, and the
10 thoroughness of the investigation.

11 Now the allegation in the Complaint, at
12 paragraph 200, is that there was no investigation
13 whatsoever. Of course, because this is a motion to
14 dismiss, there's no statement denying that, supplying
15 any kind of process that it did in fact take.

16 THE COURT: I'm sorry. I need to interrupt you
17 for a second. That hum is getting louder. Do you
18 need the computer? Okay. Is that better?

19 MR. BLOOM: So if we look to the prudence of a
20 particular fiduciary act, that is the standard.

21 Now the defendants argued earlier that you don't
22 ever look to that prior to dealing with the Moench
23 presumption. However, the Moench case itself says if
24 the fiduciary cannot show that he or she impartially
25 investigated options, courts should be willing to find

1 abuse of discretion. That is again I believe on 572
2 of the Moench decision.

3 THE COURT: Somewhere there is still --

4 MR. BLOOM: I'm almost finished.

5 The last point I wanted to make was about the
6 404(c) defense.

7 THE COURT: Okay.

8 MR. BLOOM: Which, of course, in the Fourth
9 Circuit is not really an issue. The court in DiFelice
10 ruled in footnote 3 of the opinion that even if
11 defendants managed to satisfy as a factual matter the
12 voluminous requirements of the 404(c) regulation, the
13 fiduciaries are still liable for the selection of Plan
14 investment options.

15 So those are two different sets of fiduciary
16 duties, and if they violated the one, that's a
17 problem, regardless of whether they also complied with
18 404(c).

19 Do you have any questions?

20 THE COURT: I'm all right.

21 If you would like to reply, that's fine.

22 MR. MATHIAS: Your Honor, just a few things, and
23 if you don't mind, I'll stay here and maybe avoid that
24 microphone.

25 THE COURT: Sure.

1 MR. MATHIAS: I said at the outset that the
2 facts really do matter and that the timing matters,
3 and the state of knowledge matters. I think that's as
4 true now as when I said it at the beginning of this.

5 The law is obviously very important, but I don't
6 think the law, and the distinctions that people have
7 been trying to draw on the law here really is outcome
8 determinative. It's how the facts apply to that law.

9 In the Moench case, it was a two-year period.
10 The company had lost 98 percent of its value. It had
11 dropped to 25 cents a share. Federal regulators had
12 uncovered regulatory violations. The FDIC had come in
13 and taken over the subsidiary, and the company
14 ultimately filed for bankruptcy.

15 That is exactly the kind of slow march to death
16 where this kind of thing, where a duty for a fiduciary
17 would come into play.

18 That is dramatically different from the
19 situation we are dealing with here where, as we talked
20 about, fiduciaries looking at these situations, it's a
21 fast-moving situation, where there has been zero in
22 the way of allegations that the fiduciaries knew
23 something that the rest of the market didn't in
24 advance. They're simply saying we should have
25 predicted what was going to happen in the market.

1 As to the point about Mr. Shattuck, and the
2 comments that Mr. Shattuck made, first of all, even
3 today there is no information to suggest that if the
4 credit markets hadn't completely seized up as opposed
5 to, you know, having some rocky times, which is the
6 normal situation in the last seven years, there is not
7 a shred of evidence that the company would have been
8 in the situation it was in.

9 The only time it got into a dire situation was
10 in the first week of September, which was an
11 extraordinary chain of events, external events to the
12 company, not internal events, like in Moench and all
13 the other cases, where a fiduciary would have some
14 reason to know about those internal events, and the
15 company reacted within days, not two years.

16 The other thing, and I don't know that it
17 ultimately matters, but that I find ironic, is to
18 point out that Mr. Shattuck making comments in August
19 about the company looking to increase its liquidity in
20 light of the rocky credit markets that exited somehow
21 is a bad thing. They said that we were supposed to
22 de-risk.

23 Well, you don't predict the future, but Mr.
24 Shattuck is looking at a market and he's making
25 reasonable decisions along the way. He doesn't know.

1 If somebody had told him in August that Lehman
2 was going to go into bankruptcy and that the
3 government wasn't going to bail them out, and the
4 credit markets would be totally unavailable, then the
5 company might have acted differently. But you don't
6 assume that. That's the whole point.

7 Keep in mind that in August, the company went
8 out and got \$2 billion in additional liquidity to
9 close in October. Everybody in the world thought that
10 was a reasonable solution and that nothing between
11 August and October would intervene to make credit
12 totally unavailable.

13 So that complete absence of any evidence or
14 knowledge or should have known of an impending
15 collapse really is what distinguishes our case from
16 all those other cases.

17 I just want to make a couple related points in
18 response to plaintiffs' counsel.

19 They don't specify a time when they think it
20 became inappropriate or imprudent for the fiduciary to
21 continue to offer the stock. That's their requirement
22 under the pleading rules. I mean they have to say
23 that at some point in time the fiduciary became bound
24 to divest and explain why, what it was that fiduciary
25 knew about, not the past performance of the company,

1 but the future performance of the company that made
2 them bound to divest.

3 So they simply failed under that pleading burden
4 and I think essentially acknowledged that the January
5 30th date isn't even plausible, but they haven't
6 specified any other date.

7 I think that's really all I have right now, Your
8 Honor. Thank you.

9 THE COURT: Thank you. Mr. Gillespie, anything
10 else?

11 MR. GILLESPIE: Nothing further, Your Honor.

12 THE COURT: Okay. Mr. Bloom, anything else?

13 MR. BLOOM: Nothing further, Your Honor.

14 THE COURT: All right. Well, again, thank you
15 all very much. I appreciate you all dealing with
16 difficult circumstances. However it comes out, as I
17 said before, a lot of people lost a lot of money. It
18 was not what anybody would have wanted.

19 But thank you very much. It was helpful. I
20 will give you a decision reasonably soon.

21 (The proceedings concluded.)
22
23
24
25

REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of Ronald W. Hays, et al., Plaintiffs vs. Constellation Energy Group, Inc., et al., Defendants, Civil Action No. CCB-08-2663, ERISA Litigation, before the Honorable Catherine C. Blake, United States District Judge, on June 17, 2010 is true and accurate.

Gail A. Simpkins

Official Court Reporter

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